No. 87-1804

In the Supreme Court of the United States

OCTOBER TERM, 1988

TRI-BIO LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FOOD AND DRUG ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. (& Supp. IV) 301 *et seq.*, which bars the marketing of a new animal drug absent approval by the Food and Drug Administration (FDA) of an application establishing th safety and effectiveness of the drug, permits a drug manufacturer to rely on data submitted in an application concerning another drug containing the same active and inactive ingredients that was previously approved by the FDA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 836 F.2d 135. The opinion of the district court (Pet. App. 26a-63a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on December 29, 1987. A petition for rehearing was denied on February 1, 1988 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Food, Drug, and Cosmetic Act, 29 U.S.C. (& Supp. IV) 301 *et seq.*, any "new animal drug"

is deemed unsafe and adulterated and may not be introduced or delivered for introduction into interstate commerce unless a new animal drug application (NADA) has first been approved by the Food and Drug Administration (FDA). See 21 U.S.C. 331(a), 351(a)(5), 360b(a)(1) and (b).[1] The Act defines a "new animal drug" as a drug "the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of animal drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof" (21 U.S.C. 321(w)). An NADA must contain, inter alia, "full reports of investigations which have been made to show whether or not such drug is safe and effective for use" (21 U.S.C. 360b(b)(1)). A drug that is not a duplicate for a previously approved drug is known as a "pioneer" drug. See *United States* v. *Generix Drug Corp.*, 460 U.S. 453, 454-455 (1983).

2. In August 1981, petitioner, Tri-Bio Laboratories, Inc., submitted an NADA for the marketing of a drug manufactured under the trade name Gentaject. The NADA referred to the FDA's approval in 1978 of an NADA for a pioneer drug manufactured by another company under the trade name Garasol, which contains the same active and inactive ingredients as Gentaject, and which, like Gentaject, is an injectable drug for use in one-day old chicks to prevent early mortality from three specific organisms. Garasol was patented in 1963, and its patent expired in 1980. The FDA denied petitioner's NADA for Gentaject on the ground that it did not include "full reports of investigations" establishing the safety and efficacy of Gentaject, as required by 21 U.S.C. 360b(b)(1).

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[1] The FDA enforces the Act as the designee of the Secretary of Health and Human Services. See 21 U.S.C. 371(a); 21 C.F.R. 5.10.

The FDA refused to allow petitioner to rely on information in the pioneer NADA for Garasol in support of Gentaject's safety and efficacy. Pet. App. 38a-40a.

On September 13, 1984, petitioner filed a petition with the FDA, seeking an administrative declaration that Gentaject is not a "new animal drug" because the FDA had previously determined that Garasol is safe and effective.[2] The FDA denied the petition. According to the FDA, petitioner's submission did not show that Gentaject is generally recognized as safe and effective for its intended uses. The FDA accordingly concluded that it was a new animal drug that could not be marketed without prior FDA approval of an NADA. Pet. App. 40a-42a.

3. The district court upheld the FDA's determination, concluding that it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (Pet. App. 26a-29a). Adopting the magistrate's report (see *id.* at 30a-63a), the court rejected petitioner's contention that it was not required to include "full reports of investigations" in its NADA for Gentaject, and could instead rely on FDA's prior approval of the safety and efficacy of Garasol (see *id.* at 40a-48a). The court also rejected petitioner's alternative claim that FDA approval is not required because Gentaject is identical to Garasol and, hence, is not a "new animal drug," within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321(w) (Pet. App. 48a-60a).

4. The court of appeals affirmed (Pet. App. 5a-23a). The court reasoned that this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), sup-

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[2] The petition was submitted pursuant to a settlement agreement between petitioner and the FDA, in which they agreed voluntarily to dismiss two pending lawsuits each had brought against the other. See Pet. App. 40a-41a.

ported the FDA's refusal to allow petitioner to rely on the data included in Garasol's NADA because an FDA regulation existing at the time of its submission provided the manufacturer of Garasol "with a[] * * * reasonable investment-backed expectation that the FDA would refrain from nonconsensual use of research material" (Pet. App. 17a).[3] The court also rejected petitioner's alternative contention "that because Gentaject is an exact duplicate of a previously approved drug, Gentaject is not a 'new drug' necessitating the same exhaustive testing as its pioneer" (*id.* at 18a). The court found that petitioner had failed to establish that Gentaject fell within the "narrow" statutory exception for drugs that are not considered "new," because they have " 'been used to a material extent or for a material time' " and are " 'generally recognized' " by qualified experts as safe and effective (*id.* at 19a, quoting 21 U.S.C. 321(w)). FDA's prior approval of Garasol, the court reasoned (Pet. App. 19a-20a), is not enough.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly upheld the FDA's refusal to allow petitioner to establish that Gentaject is safe and effective simply by incorporating into its own NADA data contained in another applicant's NADA without that applicant's consent. The relevant statutory language, its legislative purpose, and subsequent congressional action, all support the FDA's view, which is

[3] See 21 C.F.R. 514.1(a) ("Any reference to information furnished by a person other than the applicant may not be considered unless its use is authorized in a written statement signed by the person who submitted it.").

longstanding (see 21 C.F.R. 514.1(a); 36 Fed. Reg. 18375, 18381 (1971); 40 Fed. Reg. 13802, 13825 (1975)), and therefore, if "sufficiently rational," must be upheld. *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 981 (1986).

a. First, the language of the Federal Food, Drug, and Cosmetic Act does not support petitioner's claim (Pet. 7-14; see *id.* at 4) that the FDA must allow petitioner to appropriate data contained in another applicant's NADA. The Act provides that each NADA must include "full reports of investigations which have been made to show whether or not such drug is safe and effective for use" (21 U.S.C. 360b(b)). It nowhere suggests that an applicant must be allowed to rely on, or otherwise incorporate full reports contained in another NADA where, as in this case, the prior applicant has not consented to appropriation of its work product.[4]

b. The reasonableness of the FDA's interpretation is also supported by policy concerns. "[A]ppropriation by 'me-too' drug manufacturers of data gathered by the pioneer applicants at considerable expense would discourage the development of new products and new uses for existing ones" (Pet. App. 12a). Hence, as the court of appeals explained (*id.* at 22a), "[t]he consumer may suffer somewhat higher generic drug prices, but, in the long run, will avoid the risk of being denied the pioneer's scientific

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[4] Petitioner wrongly suggests (Pet. 10) that Section 360b(d)(1) of the Act supports its contrary view. That subsection allows the FDA to consider "information" "other" than that submitted as part of the NADA, but only in support of a determination to "issue an order *refusing* to approve the application" (21 U.S.C. 360b(d)(1) (emphasis added)). As the district court explained (Pet. App. 45a), "[i]t is not up to the FDA to make a case for the applicant, although it need not ignore any information within its knowledge which may raise questions as to the efficacy of the drug."

advances deferred by the prospect of generic manufacturers taking advantage of the developer's labor."[5] As the court of appeals further emphasized, petitioner's view would therefore also undermine any possible "reasonable investment-backed expectation[s]" (*id.* at 14a-17a) that a drug manufacturer, such as the manufacturer of Garasol, might claim it has in the data contained in its NADA (see *id.* at 17a-18a).[6]

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[5] Contrary to petitioner's claim (Pet. 7-8), the FDA's construction of the Act does not necessarily require "drug manufacturers to needlessly kill hundreds of thousands of animals at great expense." Although a manufacturer of a drug that is the duplicate of a previously-approved drug may not appropriate information contained in another's NADA (absent consent), it may rely on published scientific reports whenever available and, unlike the pioneer applicant, need not also submit the raw data upon which those reports are based. See 46 Fed. Reg. 27396 (1981); 45 Fed. Reg. 82052-82063 (1980); see generally *Upjohn Mfg.* v. *Schweiker*, 681 F.2d 480, 482 (6th Cir. 1982). In any event, federal statutes necessarily reflect the legislators' choice between competing objectives and, consequently, an agency's construction of a statute obviously does not fail merely because some undesirable effects may possibly result.

[6] Petitioner mistakenly suggests (Pet. i) that this case ultimately turns on the "reasonableness" of any investment-backed expectation that the manufacturer of Garasol might have in information contained in its NADA, based on an FDA regulation restricting the use by any person of information contained in another's NADA (see 21 C.F.R. 514.1(a); note 3, *supra*). FDA's determination that petitioner may not incorporate information contained in another's NADA is a reasonable construction of the Act's statutory language, in light of the policy and purposes of the Act. That construction need not be constitutionally compelled by the Takings Clause to be valid. For this reason, petitioner's discussion (Pet. 10-14) of *Ruckelshaus* v. *Monsanto Co.*, *supra*, *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), and the Tucker Act, is generally misdirected.

c. More recent legislative developments confirm the correctness of the FDA's construction of the Act. In 1984, Congress enacted a law, the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (amending 21 U.S.C. 355), that allows for the very type of abbreviated application procedure that petitioner seeks to utilize here—but only for generic human drugs, not animal drugs. The 1984 law authorizes an abbreviated application procedure for generic human drugs that demonstrate bioequivalence with previously approved pioneer drugs, but also provides pioneer drug manufacturers with a specified period, beyond the expiration of the drug's patent, within which no abbreviated application may be approved (21 U.S.C. (Supp. IV) 355(j)(4)(D)(i)-(v)).

As this recent legislation demonstrates, Congress is aware of the FDA's construction of the Federal Food, Drug, and Cosmetic Act (see, *e.g.*, H.R. Rep. 98-857, 98th Cong., 2d Sess. Pt. 1, at 14 (1984)). Indeed, as set out in the court of appeals' opinion (Pet. App. 13a-14a), Congress has considered several proposals that would make similar revisions to the application procedure for animal drugs. For example, an early version of the legislation ultimately enacted in 1984 (regarding only human drugs) would have applied to both human and animal drugs. See S. 255, 97th Cong., 1st Sess. § 155(c)(1)(A) and (c)(4) (1981). Congress, however, has not yet adopted any of the various proposals to amend the law regarding animal drugs.[7] Its "failure to change the scheme under which the FDA operated is significant, for a 'congressional failure to revise or repeal the agency's interpretation is persuasive

[7] The House is currently considering a bill, which was introduced on May 26, 1988, that would extend the abbreviated application procedures to animal drugs. See H.R. 4714, 100th Cong., 2d Sess. (1988).

evidence that the interpretation is the one intended by Congress' " (*Young* v. *Community Nutrition Inst.*, 476 U.S. at 983, quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The court of appeals correctly refused to provide petitioner with the very legislative amendment that Congress has declined to adopt.[8]

2. Contrary to petitioner's claim (Pet. 11), the court of appeals' decision in this case does not conflict with the Sixth Circuit's decision in *Upjohn Mfg.* v. *Schweiker*, 681 F.2d 480 (1982). *Upjohn* involved a drug manufacturer's claim that the FDA had improperly relied upon trade secret data in its NADA in approving a competitor's NADA. The Sixth Circuit's rejection of that claim, finding "no evidence in the record" to support it (681 F.2d at 484), is entirely consistent with the court's ruling here that consent is required. The Sixth Circuit's decision in *Upjohn* thus does not conflict with the court's ruling here that one applicant may not appropriate information contained in another's NADA without its consent.[9]

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[8] Petitioner actually seeks more than that obtained in the 1984 Act concerning human drugs. As described above, that Act, unlike petitioner's requested relief, provides pioneer drug manufacturers with a period of time within which abbreviated application procedures may *not* be utilized (see 21 U.S.C. (Supp. IV) 355(j)(4)(D)(i)-(v)). Hence, Congress has expressly required the very duplicative application procedures for human drugs, albeit only for a limited time, that petitioner contends Congress could not possibly have intended to require for animal drugs.

[9] Petitioner does not appear to renew its claim, which was correctly rejected by the court of appeals (Pet. App. 18a-20a), that Gentaject is not a "new animal drug." Gentaject would be something other than a "new animal drug," as defined by the Act, only if it had been "generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of animal drugs, as safe and effective" and had "been used to a material extent or for a

CONCLUSION

The petition for a writ of certiorari should be denied.

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material time" (21 U.S.C. 321(w)). As the court of appeals held (Pet. App. 18a-19a), approval by the FDA of a drug containing the same chemicals is not enough to trigger that narrow statutory exception. FDA approval is not equivalent to "general recognition." Nor does FDA approval mean that a drug has necessarily "been used to a material extent or for a material time." To establish "general recogni[tion]," an applicant must instead produce "evidence consisting of adequate and well-controlled investigations, including field investigation, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug" (21 U.S.C. 360b(d)(3)). As the court of appeals found (Pet. App. 19a, quoting *Weinberger* v. *Bentex Pharmaceuticals*, 412 U.S. 645, 652 (1973)), "the investigation should be 'backed by substantial support in scientific literature.' " In this case, petitioner failed to "refer to any established body of published literature on Garasol" in its petition to the FDA (Pet. App. 19a). In addition, the FDA "found deficiencies in those materials submitted in support of Garasol's general recognition status" (*ibid.*). The court of appeals therefore correctly upheld "the FDA's decision that the [petitioner's] petition did not present adequate scientific evidence to sustain a finding of general recognition" (*id.* at 20a).

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